RECENT CASES.

AGENCY — EMERGENCIES — IMPLIED AUTHORITY OF CONDUCTORS. — *Held*, that a conductor cannot bind his employers for a doctor's services rendered to trespassers injured by an accident to the train on which they were riding. *Adams* v. *Southern Ry. Co.*, 34 S. E. Rep. 642 (N. C.).

The question as to how far an agent's authority may be increased by emergencies is still an open one. By the weight of authority, however, the doctrine of this case applies even where the injured persons are passengers or employees. *St. Louis, etc. R. R. Co.* v. *Olive*, 40 Ill. App. 82; *Peninsular R. R. Co.* v. *Gary*, 22 Fla. 356; *Cox* v. *Midland Countries Ry. Co.*, 3 Ex. D. 268. As a matter of expediency, where the emergency is pressing, the contrary view seems the more reasonable. *Toledo, etc. R. R. Co.* v. *Mylott*, 6 Ind. App. 438. Under the latter doctrine, had there been any question in this case as to the character of the injured persons, it seems the defendant might have been liable, for it would then have been the duty of the conductor to decide whether they were trespassers or not, and his mistake of judgment would not have relieved the defendant from liability. *Seymour* v. *Greenwood*, 6 H. & N. 359. The correctness of the actual decision, however, can hardly be questioned. The defendant was under no duty to care for such trespassers, and the conductor's act was clearly without the scope of his authority, expressed or implied.

AGENCY — VICE-PRINCIPAL DOCTRINE — FELLOW SERVANTS. — In the absence of special powers conferred upon the conductor of a freight train, *held*, that such conductor and the engineer are fellow servants within the rule exempting the master from liability for negligence of one servant towards another. *New England R. R. Co.* v. *Conroy*, 20 Sup. Ct. Rep. 85.

The rule prevails in several states that two employees under a common employer are not fellow servants if one is subject to the orders of the other and so falls under his control. The superior employee is said to be a vice-principal, and for his negligence towards inferiors the ultimate master is held liable. *Cleveland, etc. Ry. Co.* v. *Keary*, 3 Ohio St. 202; *Chicago, etc. Ry. Co.* v. *May*, 108 Ill. 288. This doctrine was applied by the Supreme Court to facts identical with those in the principal case in *Chicago, etc. Ry. Co.* v. *Ross*, 112 U. S. 377, which decision is now for the first time explicitly overruled, although it has been twice inferentially repudiated. *Baltimore, etc. Ry. Co.* v. *Baugh*, 149 U. S. 368; *Northern, etc. Ry. Co.* v. *Peterson*, 162 U. S. 364. The present decision is to be welcomed as definitely settling the attitude of the Supreme Court towards the "Ross case," and as dealing a severe blow to the vice-principal doctrine, which is believed to be unsound. See 8 HARV. LAW REV. 57; 12 HARV. LAW REV. 147; McKinney, Fellow Servants, Chap. IV. The doctrine can now be applied by the Supreme Court at most to cases of a considerable difference in grade between the employees, and then by virtue of a distinction which seems arbitrary rather than logical.

BANKRUPTCY — FIDUCIARY DEBTS — DISCHARGE. — *Held*, that a debt due by the bankrupt, a commission merchant, arising out of his failure to account for the proceeds of goods consigned to him for sale on commission, is released by his discharge in bankruptcy. *Re Basch*, 97 Fed. Rep. 761 (Dist. Ct., N. Y.).

By the Bankruptcy Act of 1898, as is usual in bankruptcy legislation, debts created by misappropriation while acting in any fiduciary capacity are not discharged. § 17 (4). The question whether under the circumstances of the principal case the debt is within this exception has caused much diversity in the authorities. Under the state laws it has been held that such debts are contracted in a fiduciary capacity. *Meador* v. *Sharpe*, 54 Ga. 125; *Whitaker* v. *Chapman*, 3 Lans. 155. *Contra*, *Anstill* v. *Crawford*, 7 Ala. 335; *Chipley* v. *Frierson*, 18 Fla. 639. Under the federal statutes, the Supreme Court of the United States finally held, in accord with the principal case, that such a debt was discharged. *Chipman* v. *Forsythe*, 2 How. 202; *Hennequin* v. *Clewes*, 111 U. S. 676. Upon abstract principles, doubtless, a factor is a fiduciary, and so debts created by his misappropriation should not be discharged. But the decision in the principal case may be justified by the usage of factors, often recognized as a legal right, to mix the proceeds of sales with their own money, and thereby to become debtors merely. *Hewlick* v. *McDonald*, 80 Cal. 472; *Vail* v. *Durant*, 90 Mass. 408. Accordingly, the decision in the principal case may be accepted without much hesitation.

BANKRUPTCY — SURRENDER OF PREFERENCES. — A creditor held two promissory notes of his insolvent debtor. Within four months of the bankruptcy but without any

knowledge of the insolvency, he received payment of one of the notes. *Held*, that he cannot prove the other note in the bankruptcy proceedings without first surrendering the payment so received. *Re Conhaim*, 97 Fed. Rep. 923 (Dist. Ct. Wash.).

The Bankruptcy Act of 1898, § 57 g, provides that "the claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences." Under the Bankruptcy Act of 1867, § 23, such creditors were prohibited from proving the "claim on account of which the preference was made." Under that provision the courts held that where the creditor had two disconnected debts, as in the principal case, and had been preferred as to one, he might prove the other without surrender of the preference. *Re Richter*, Fed. Cas. No. 11803; *Re Aspinwall*, 11 Fed. Rep. 136 (Dist. Ct. N. Y.); *Re McVay*, 13 Fed. Rep. 443 (Dist. Ct. Pa.). It may well be doubted whether the variation in the language of the two provisions is sufficient to warrant a different construction under the present act in any case. Moreover, the principle of interpretation, *reddendum singula singulis*, would seem to apply and lead to a result the opposite of that reached in the principal case. At all events, there is no justice in the principal case.

CONFLICT OF LAWS — GARNISHMENT — JURISDICTION OF DEBT. — *Held*, that the *situs* of a debt for the purposes of garnishment is at the domicil of the creditor. *Central of Georgia Ry. Co.* v. *Brinson*, 34 S. E. Rep. 597 (Ga.).

Held, that the garnishment of a resident debtor for a debt due to a non-resident defendant is not void. *King* v. *Cross*, 20 Sup. Ct. Rep. 131. See NOTES.

CONFLICT OF LAWS — JURISDICTION — NULLITY OF MARRIAGE. — *Held*, that an Irish court has jurisdiction to make a declaration of nullity in the case of a marriage celebrated in India when the party whose capacity is in question was domiciled in Ireland at the time of the marriage. *Johnson* v. *Cooke*, [1898] 2 Ir. 130.

A decree of nullity declares the marriage void from the beginning. No court can properly make such a decree except in a jurisdiction which had power over the *status* at its inception. Hence it seems that in this country there is no jurisdiction to decree nullity except in the place of celebration. *Cummington* v. *Belchertown*, 149 Mass. 223. The House of Lords has decided, however, that the validity of a marriage, as far as the capacity of the parties is concerned, depends upon the law of the domicil of the parties, and not that of the place of celebration. *Brook* v. *Brook*, 9 H. L. Cas. 193. Since, under this rule, it was the law of Ireland which gave this marriage its validity, if it had any, it appears that the court was right in asserting its power to declare the marriage void.

CONSTITUTIONAL LAW — IMPAIRING THE OBLIGATION OF CONTRACTS. — The defendant city granted the plaintiff a non-exclusive franchise to build and maintain a water system. Later the city constructed a water system of its own under statutes which allowed it to tax the plaintiff for the payment of obligations incurred in the construction of the defendant's works, and authorized a discriminating tax against the plaintiff's patrons, thus forcing them to leave the plaintiff. *Held*, that these provisions are unconstitutional, since they impair the obligation of a contract by tending to destroy the value of the plaintiff's franchise through other means than competition. *Skaneateles Waterworks Co.* v. *Skaneateles*, 55 N. E. Rep. 562 (N. Y.).

Public grants are to be construed strictly. *Charles River Bridge Co.* v. *Warren Bridge*, 11 Pet. 420. Accordingly, it seems clear that as this was not an exclusive grant the city could construct a competing water system. *Syracuse Water Co.* v. *Syracuse*, 116 N. Y. 167. In fact the court admits this, and thereby seems to destroy the ground upon which the decision is rested. Perhaps such taxation may deprive the plaintiff of the equal protection of the law, and may deprive it of its property without the due process of law secured by the Fourteenth Amendment, but this suggestion was not considered. The city did not contract not to tax the plaintiff or its patrons unjustly, any more than it agreed not to compete with the plaintiff. If a contract cannot be implied in one case, it cannot in the other. The court, indeed, distinguishes the *Charles River Bridge Case* by restricting its application to cases of competition. But its principle seems entirely applicable to the present case. There the plaintiff's patronage was destroyed by relieving those crossing by the adjacent bridge from the burden of toll. Here an extra burden is imposed on the plaintiff's patrons. In each case the result is to destroy patronage, and only indirectly to affect the grant.

CONSTITUTIONAL LAW — RAILROADS — STATUTORY LIABILITY TO PASSENGERS. — *Held*, that a state statute making railroad companies absolutely liable for injuries to passengers who are without fault, irrespective of the company's negligence, does not violate the Fourteenth Amendment of the United States Constitution. *Clark* v. *Russell*, 97 Fed. Rep. 900 (C. C. A., Eighth Cir.).

The argument against the constitutionality of such a statute is that it violates the Fourteenth Amendment in that it is an arbitrary and unreasonable exercise of legislative power, depriving the railway company of its property without due process of law, and denying to it the equal protection of the laws. Such a statute, however, is undoubtedly within the legitimate sphere of legislative power. The legislature may well consider it advantageous to impose such liability upon railroads, and may properly impose conditions under which corporations created by its laws shall conduct their business in the future. Whether the railroad is deprived of property or not, therefore, it is by due process of law. *St. Louis, etc. R. R. Co.* v. *Mathews*, 165 U. S. 1. Similar statutes imposing an absolute liability on railroads for damages by fire have been universally upheld, and exist in many states. *Grissell* v. *Housatonic R. R. Co.*, 54 Conn. 447; *Rodemacher* v. *Milwaukee, etc. R. R. Co.*, 41 Iowa, 297. Nor is such a statute open to the objection that it denies to the railroad the equal protection of the laws. It has been repeatedly held that there is no evasion of the rule of equality when all railroad companies in the state are subjected to the same duties and liabilities under similar circumstances as in the present case. *Missouri Pacific R. R. Co.* v. *Humes*, 115 U. S. 512; *Missouri Pacific R. R. Co.* v. *Mackey*, 127 U. S. 205.

CONSTITUTIONAL LAW — REGISTRATION ACT. — *Held*, that the Torrens system of land registration is constitutional. *Tyler* v. *Judges of the Court of Registration*, 55 N. E. Rep. 812 (Mass.). See NOTES.

CONTRACTS — IMPLIED PROMISE TO USE DUE CARE — DUTY TO THIRD PERSONS. — A mortgagor purchased of the defendant title company a certificate that the land in question was unincumbered, — expressly telling him that the plaintiff had agreed to take a mortgage provided he would get such a certificate. The land proved to be subject to a prior recorded mortgage. *Held*, that the plaintiff has a contractual recovery for his loss either as a mortgagor's principal or as the sole beneficiary of an implied promise to use due care. *Economy, etc. Assn.* v. *West Jersey, etc. Co.*, 44 Atl. Rep. 854 (N. J., Sup. Ct.).

It is hardly possible to admit that the mortgagor was acting as the plaintiff's agent, for he dealt with the defendant purely in his own interest, and not in pursuance of any duty imposed on him by the plaintiff. *Harris* v. *Bradley*, 7 Yerg. 310. Nor is the plaintiff's right as sole beneficiary clear. The certificate contains no express undertaking upon which there may be an action, the purchaser's remedy being for the breach of a promise implied in law to use due care. *Houseman* v. *Girard, etc. Assn.*, 81 Pa. St. 256; *Smith* v. *Holmes*, 54 Mich. 104. It seems impossible, however, to allow a stranger to the *quid pro quo* to take advantage of a promise implied in law, and for the same reason it is equally impossible to imply the promise directly to him. Though the plaintiff is without contractual right against the defendant, perhaps, in principle, he should be given an action in tort for a negligent misrepresentation. What authority there is, however, holds that a person is under no duty, in the absence of contract, to use care not to make misrepresentations. *Le Lievre* v. *Gould*, [1893] 1 Q. B. 491; *Savings Bank* v. *Ward*, 100 U. S. 195; *Day* v. *Reynolds*, 23 Hun, 231.

CONTRACTS — IMPOSSIBILITY OF PERFORMANCE — ILLNESS. — After becoming engaged the defendant without fault contracted a serious disease. *Held*, that this is a valid defence to an action for breach of promise to marry. *Sanders* v. *Coleman*, 34 S. E. Rep. 621 (Va.).

There is a well-established class of cases where, although there has been a failure to perform a contract, the law gives, what is really an equitable defence, on the ground of so-called "impossibility." See 12 HARV. LAW REV. 501. Such a defence has been allowed on facts similar to those in the principal case. *Shackleford* v. *Hamilton*, 93 Ky. 80; *Allen* v. *Baker*, 86 N. C. 91. The opposite view has received support, however, *Hall* v. *Wright*, E. B. & E. 765. Analogous to these cases are those where illness excuses a failure to render personal services. *Spalding* v. *Rosa*, 71 N. Y. 40; *Boast* v. *Firth*, L. R. 4 C. P. 1. One might distinguish the principal case, on the ground that a formal performance of the marriage ceremony is possible. But the fact remains, that any attempt at substantial performance would be both injurious to the defendant and deplorable on grounds of public policy. The result seems, therefore, equally desirable and just.

CORPORATIONS — PROCEDURE — DISQUALIFICATION OF JUDGE BY INTEREST. — *Held*, that a judge whose wife is a stockholder in a corporation is incompetent to try a suit to which the corporation is a party. *First Nat. Bank of Rapid City* v. *McGuire*, 80 N. W. Rep. 1074 (S. D.).

It is generally recognized that a shareholder in a corporation is incompetent to act as

judge in a suit where the corporation is a party. *Dimes* v. *Grand Junction Canal*, 3 H. L. Cas. 759. But where, as in the principal case, the judge is related to a stockholder, the question has generally been left to his discretion. *Matter of Dodge & Stevenson Mfg. Co.*, 77 N. Y. 101; *Searsburgh Turnpike Co.* v. *Cutler*, 6 Vt. 315. This seems to be the sounder rule. The authorities do not justify the conclusion that a judge is necessarily disqualified except by some direct pecuniary or proprietary interest in the result of the suit. *Northampton* v. *Smith*, 52 Mass. 390. As it is obviously impracticable to exclude a judge from every suit in which he may be personally interested, it seems better to leave cases which fall outside this simple rule to the good sense of judges, subject of course to the power of higher courts to check abuse. The result in the principal case may possibly be supported as an exercise of this power, but the decision is rested solely on the fact of relationship.

CORPORATIONS — PROMOTER A FIDUCIARY — DISCLOSURE OF RELATION. — The plaintiff company was formed by the defendant syndicate to purchase property of the latter. The syndicate chose its own directors to manage the new company. *Held*, that a bare statement of the relation in the prospectus discharges the fiduciary obligation of the vendors. *Lagunas Nitrate Co.* v. *Lagunas Syndicate*, [1899] 2 Ch. D. 392. See NOTES.

CORPORATIONS — SERVICE OF SUMMONS — JUDGMENT BY DEFAULT. — Service of summons was made on a director of the defendant company, who, through unfriendliness to the corporation, but without collusion with the plaintiff, failed to report the service. *Held*, that a judgment by default obtained under these circumstances will be set aside and the company permitted to answer. *Farrar* v. *Consolidated Apex Mining Co.*, 80 N. W. Rep. 1079 (S. D.).

There is a remarkable lack of authority on the point, owing probably to the fact that, in the absence of collusion, the success of a corporation is generally to the pecuniary advantage of a director. It is certainly hard, from the standpoint of the corporation, to allow judgment to be entered against it merely because of the neglect or unfriendliness of a director in failing to notify the company of the service of process. Still, where, as in South Dakota, service, in a suit against a corporation, may be made on a director, the corporation, it seems, must necessarily run such a risk. If there has been collusion, the judgment should certainly be set aside; but where the plaintiff has acted with entire good faith, as is assumed in the present case, it is the logical, though perhaps harsh, result of a statute allowing such service, that the loss should fall on the corporation. The opposite view, taken by the principal case, might defeat the object of the statute by disclosing a loophole whereby a corporation could escape the consequences of a service of process.

CRIMINAL LAW — INDICTMENT — REPEAL OF STATUTE. — The statute under which the defendant had been indicted was repealed without saving clause, and reënacted the same day to go into effect one day later. *Held*, that the indictment is good. *State* v. *Southern Ry. Co.*, 34 S. E. Rep. 527 (N. C.).

It is generally recognized that the repeal of a statute and its simultaneous reënactment operate merely as a reaffirmance. Bish. Stat. Cr. § 181; *State* v. *Gumber*, 37 Wis. 298. But in the principal case the reënacting statute did not go into effect at the time the repeal did, and the ordinary rule would seem to apply that no proceedings can be carried on under a statute which has been repealed without saving clause. *Regina* v. *Denton*, 18 Q. B. 761; *Griffin* v. *State*, 39 Ala. 541. The court disposes of this difficulty on the ground that the result was a mere suspension of the former act, the intervening day being *dies non*. But the same argument would apply equally if the later act were passed five years later, a result which would hardly be countenanced. End. Stat. Interp. § 491; *Kane* v. *New York, etc. R. R. Co.*, 49 Conn. 139. Some support may be found for the decision in the cases which hold that where a repealing statute is repealed a prosecution under the original statute may be continued. *Commonwealth* v. *Getchell*, 33 Mass. 452. But even in such cases this is not the better view. *Commonwealth* v. *Leech*, 24 Pa. St. 55.

CRIMINAL LAW — LIBEL — PRIVILEGE. — The defendant, in good faith, published an article in his newspaper falsely charging a candidate for district judge with crime. The newspaper's circulation extended without the judicial district. *Held*, that the publication is not privileged, and that the defendant was properly convicted of criminal libel. *State* v. *Hoskins*, 80 N. W. Rep. 1063 (Iowa).

Declining to discuss whether a charge against a candidate for office is privileged when made *bona fide* to protect the public interests, the court rests its decision on the narrow ground that the publication was not confined to the district directly concerned.

If the communication is privileged, the privilege ought not to be lost so long as a reasonable use is made of it. *Hatch* v. *Lane*, 105 Mass. 394. And it seems that it is not an unreasonable use to publish the communication in a paper which in its circulation reaches others than those directly interested. By the weight of authority, under no circumstances could such a false charge be privileged. *Duncombe* v. *Daniell*, 8 C. & P. 222; *Commonwealth* v. *Clap*, 4 Mass. 103; *Sweeney* v. *Baker*, 13 W. Va. 158. But there are a number of cases *contra*. *Briggs* v. *Garrett*, 111 Pa. St. 404; *Marks* v. *Baker*, 28 Minn. 162. The latter view seems preferable upon grounds of public policy. The public interests should be protected even at the risk of occasional injustice to the individual; and this is only possible under the more liberal rule. See 23 Am. Law Rev. 346.

EVIDENCE — DIVORCE — CHARACTER. — In an action for divorce, on the ground of adultery, *held*, that the defendant can introduce evidence as to her general reputation. *Warner* v. *Warner*, 44 Atl. Rep. 908 (N. H.).

The court takes the ground that in divorce cases the common law rules of evidence do not apply. This is too sweeping a statement, and contrary to authority even in New Hampshire. *Washburn* v. *Washburn*, 5 N. H. 195; *Caton* v. *Caton*, 13 Eng. Jur. 431; 2 Bish. Mar. Div. & Separ. §§ 1350, 1427. Nevertheless, a decision in accord with the principal case has been reached, on the ground, that when the issue is as to the commission of a criminal act, the same evidence is admissible in a civil action, as would be admissible in a criminal prosecution. *O'Bryan* v. *O'Bryan*, 13 Mo. 6. The weight of authority, however, is opposed to this view also, and holds that character evidence is never admissible in a civil action, on the issue of the commission of an act. *Humphrey* v. *Humphrey*, 7 Conn. 116; *Day* v. *Ross*, 154 Mass. 13; *American, etc. Co.* v. *Hazen*, 110 Pa. St. 530. There seems, therefore, to be no sound ground upon which to support the principal case.

PERSONS — HUSBAND AND WIFE — CONTRACT OF SEPARATION. — *Held*, that a contract between husband and wife to live apart is void as against public policy, where neither has been guilty of conduct which would justify a judicial separation. *Poillon* v. *Poillon*, 61 N. Y. Supp. 582 (Sup. Ct., Trial Term); *Scherer* v. *Scherer*, 55 N. E. Rep. 494 (Ind.).

In the United States it is held almost universally that it is against public policy to enforce such an agreement. To give effect to it, it is urged, would be to allow the parties to free themselves from the marriage relation at will, and would have the undesirable tendency of weakening family ties. *McCrocklin* v. *McCrocklin*, 2 B. Mon. 370; *McKennan* v. *Phillips*, 6 Whart. 571. The English decisions, though formerly in accord with the present case, now maintain that such a contract is not against public policy. It is thought to be to the interests of the public to have family differences settled without the expense and scandal incident to the divorce court, and that such separations are more productive of morality among married people. *Besant* v. *Wood*, 12 Ch. D. 605; *Marshall* v. *Marshall*, 5 P. D. 19. As easy divorces are naturally conducive to hasty and ill-considered marriages, however, the standard of marriage is probably more likely to be raised by the doctrine of the present case than by the English view.

PLEADING — TROVER — NATURE OF PLAINTIFF'S RIGHT. — The plaintiff wrongfully entered land and cut and removed timber to which he had no right. The defendant, without claim of right, took the logs. *Held*, that the plaintiff cannot recover in an action in the nature of trover, since he had not title to the property. *Russell* v. *Hill*, 34 S. W. Rep. 620 (N. C.).

The court laid stress on the fact that, as the true owner could recover from the defendant, to allow trover here would subject him to two actions. They admitted, however, that the plaintiff could maintain trespass. This is open to the same objection. When trover was first devised, under the fertile statute of West. II., as an action against a finder for wrongfully detaining plaintiff's goods, it is true the plaintiff's right was not founded on a bare possession, but on a right to possession. But the advantages of this fictitious action operated to give it a wonderful growth. In trespass, where the defendant could wage his law, the court allowed the plaintiff to waive the taking and sue for the detaining of his chattel. *Basset* v. *Maynard*, 1 Roll. Ab. 105; *Bishop* v. *Montague*, Cro. El. 824. The trover came to occupy the whole field covered by the old actions of trespass and detinue. 11 HARV. LAW REV. 252, 384. Furthermore, it is not true that this doctrine allows two actions for one wrongful act. The wrong done the plaintiff here is the taking from his possession, while it is the detaining of his chattel for which the true owner can sue. Accordingly, the doctrine of the principal case seems indefensible.

PROPERTY — ARTIFICIAL WATERCOURSE — PRESCRIPTION. — For over twenty years, water from an artificial drain on the plaintiff's land had passed onto the defendant's land, and there been used by the defendant. *Held*, that the defendant has acquired no right to this supply of water. *Hanna* v. *Pollock*, [1898] 2 Ir. 532.

The proposition that one cannot acquire a prescriptive right to the use of water from a watercourse that is artificial and temporary in its nature is made the basis of this decision, and is supported by considerable authority. *Arkwright* v. *Gell*, 5 M. & W. 203; *Wood* v. *Waud*, 3 Ex. 748; *Greatrex* v. *Hayward*, 8 Ex. 291. It is very questionable whether any such distinction between natural and artificial watercourses is sound. Indeed it has been held that if a man tortiously divert onto his own land an artificial stream and use it for twenty years, a prescriptive right will be gained thereby, since the user was always actionable as against the owner of the land from which the stream was diverted. *Beeston* v. *Weate*, 5 E. & B. 986; *Watkins* v. *Peck*, 13 N. H. 360. The decision in the principal case, however, is doubtless correct on the facts, since the defendant's passive reception of the water sent down on him by the plaintiff was in no way actionable, and could therefore give rise to no right against the plaintiff.

PROPERTY — COVENANT AGAINST INCUMBRANCES — SUCCESSIVE GRANTEES. — The defendant conveyed incumbered land to B with a covenant against incumbrances. B conveyed to C expressly subject to the incumbrance, and C conveyed to the plaintiff covenanting against incumbrances. The plaintiff paid the incumbrance. *Held*, that he cannot recover from the defendant, since the conveyance from B to C was expressly subject to the incumbrance. *Geiszler* v. *De Graaf*, 60 N. Y. Supp. 651 (Sup. Ct., App. Div., First Dept.).

A covenant against incumbrances is broken, if at all, as soon as made, and, as the American authorities repudiate the English doctrine of continuing breach, it follows that the original grantee is the only one who can logically bring an action for such breach. *Greenby* v. *Wilcocks*, 2 Johns. 1. But now in New York, since the assignee of a chose in action is allowed by statute to sue in his own name, the practical results of the English doctrine are accomplished by holding that the deed operates as an assignment of the chose in action, giving a right to sue on the broken covenant to the assignee who sustains substantial damage. *Clarke* v. *Priest*, 21 N. Y. App. Div. 174. In the principal case the original grantee paid for a clear title and was compelled to sell the land incumbered, thus suffering substantial damage. *Funk* v. *Voneida*, 11 S. & R. 109. Therefore the right to maintain an action on the broken covenant vested in him and subsequent grantees could acquire no rights under it. Applying the doctrine of continuing breach to similar facts produces a like result. *Kingdon* v. *Nottle*, 1 M. & S. 355. The principal case is doubtless correct.

PROPERTY — FRAUDULENT CONVEYANCE — ORAL TRUST. — X for the purpose of defrauding his creditors conveyed land to his son upon an oral trust for himself. The son to get the property out of the reach of his creditors reconveyed the land to X. *Held*, that the reconveyance is valid as against the creditors of the son. *Lockren* v. *Rustan*, 81 N. W. Rep. 60 (N. D.).

X could not have enforced the express trust, because it was not in writing as required by the Statute of Frauds. Nor would a court of equity have declared a constructive trust in favor of X, the parties being *in pari delicto*. Wait, Fraud. Convey. 2d ed., 396. This rule is universal, although there is an apparent tendency to relax upon it in some English cases. *Bowes* v. *Foster*, 2 H. & N. 779. But an express trust, while unenforcible, nevertheless did exist, and the trustee having voluntarily performed his duty under it, although with fraudulent intent, the transaction is unassailable except by such persons as had acquired a lien on the property on the faith of the apparent absolute ownership. *Fargo* v. *Ladd*, 6 Wis. 106. The decision seems therefore sound.

PROPERTY — MORTGAGES — CLOGGING EQUITY OF REDEMPTION. — In a mortgage of leasehold property the mortgagee stipulated for one third of the net profits from all sub-leases during the term, besides interest. *Held*, that this provision does not fall within the rule against clogging the equity of redemption and is valid. *Santley* v. *Wilde*, [1899] 2 Ch. D. 474. See NOTES.

SALES — CONDITIONAL SALE — RISK OF LOSS. — The plaintiff sold to the defendant certain goods the title to which the former was to retain until the price was paid. Before payment an accidental fire destroyed the goods. *Held*, that the loss falls on the plaintiff. *Mountain City Mill Co.* v. *Butler*, 34 S. E. Rep. 565 (Ga.).

This case represents the settled rule in the state of Georgia. *Green* v. *Kuoop*, 73 Ga. 510. Almost the entire weight of authority, however, is *contra*. *Topp* v. *White*, 12 Heisk. 165; *Tufts* v. *Griffin*, 107 N. C. 47. On principle, also, the decision seems in-

defensible. The vendor in such a case holds the title merely as security for the payment of the price, and the result is the same as if the vendor had conveyed the title to the vendee and the latter had reconveyed it to the vendor by way of mortgage. The position of the parties in fact seems completely analogous to that of mortgagor and mortgagee in jurisdictions where the title passes, and in almost all such cases the mortgagor, since he is substantial owner, must bear the loss if the property mortgaged is accidentally destroyed or injured. *Osborn* v. *Nicholson*, 13 Wall. 654; *Morgan* v. *Scott*, 26 Pa. St. 51. The loss in the principal case, therefore, should fall on the vendee. See 9 HARV. LAW REV. 106.

SALES — FOREIGN ORDER — WHERE COMPLETED. — The defendant in Iowa ordered liquors of the plaintiff in Illinois, but before the goods were shipped countermanded the order. Thereafter the plaintiff sent the liquor and the defendant accepted it and used it. The sale of liquor in Iowa is prohibited by statute. *Held*, that the plaintiff can recover the price of the goods. *Gross* v. *Feelan*, 81 N. W. Rep. 235 (Iowa).

The decision seems doubtful. A sale occurs in that jurisdiction in which the title passes. *State* v. *O'Neil*, 58 Vt. 140; *Commonwealth* v. *Fleming*, 130 Pa. St. 138. To constitute a sale there must be a contemporaneous assent by both vendor and vendee that the title shall pass from one to the other. Benj. Sales, 7th Am. ed., § 38. In the principal case the revocation of the order by the defendant destroyed its effect, Parsons, Contr. 8th ed., 498, and when the goods were shipped it was without the assent of the vendee. Therefore the title did not pass to him by the delivery to the carrier in Illinois. *The Francis*, 2 Gall. 391; *The Julia*, 8 Cranch, 183. The sale then did not take place in Illinois. The title did, however, vest in the defendant when he accepted the goods in Iowa. *Wellauer* v. *Fellows*, 48 Wis. 105. Since, therefore, the sale occurred in a state where such a transaction is illegal, the vendor cannot recover the price. *Foster* v. *Thurston*, 11 Cush. 322; *Briggs* v. *Campbell*, 25 Vt. 704.

SALES — GOODS IN POSSESSION OF BAILEE — RIGHTS OF MORTGAGEE. — The mortgagor of chattels in the possession of a bailee gave the mortgagee an order on the bailee for the goods. Before the mortgagee had notified the bailee of his claim, or the mortgage had been recorded, the creditors of the mortgagor attached the goods. *Held*, that the order is insufficient to protect the mortgagee. *Strahorn, etc. Co.* v. *Quigg*, 97 Fed. Rep. 735 (C. C. A., Eighth Cir.).

It is a moot question how much is necessary to protect the vendee or mortgagee against the attaching creditors of the vendor or mortgagor, where the goods have not actually been delivered or the deed recorded. If the goods remain in the possession of the vendor after the sale, the attachment is generally held good, because the vendee has allowed the vendor to appear to be the absolute owner, and the creditor has a right to regard him as such, unless he has notice to the contrary. *Ludwig* v. *Fuller*, 17 Me. 162. The principal case, like perhaps the majority of the cases in point, holds that the same considerations require notice to the bailee, if the goods are in possession of a third party, to make an assignment of the vendor's interest effective against creditors. *Whitney* v. *Lynde*, 16 Vt. 579. It seems, however, that on principle the question of notice to the bailee is immaterial. *Bitt* v. *Caldwell*, 4 Bibb, 458; *Puckett* v. *Reed*, 31 Ark. 131. The vendor is not made to appear the absolute owner, as he has not possession, and there is little chance that his creditors will be deceived by the situation. The vendee has acquired by assignment complete title to the goods, and no sufficient reason appears for subjecting them to the claims of the creditor of another person.

SALES — MORTGAGE OF AFTER-ACQUIRED PROPERTY. — *Held*, that a chattel mortgage of all the personal property the mortgagor should acquire during certain years is void as against third persons. *Ferguson* v. *Wilson*, 80 N. W. Rep. 1006 (Mich.). See NOTES.

SURETYSHIP — MERGER — LOSS OF SECURITY. — A principal debtor executed a mortgage of indemnity to his surety, who assigned it to the creditor. The debtor then made an absolute conveyance of the premises to the surety, who assumed the debt. The surety afterwards conveyed the property to the creditor by a deed absolute in form as a security for his further indebtedness. *Held*, that the creditor has a lien upon the land by virtue of the mortgage prior to that of a subsequent judgment creditor of the surety. *Oak Creek, etc. Bank* v. *Helmer*, 80 N. W. Rep. 891 (Neb.).

There is always a merger at law when a greater and less estate coincide in the same person in the same right. In such cases, however, equity will frequently keep alive the lesser interest in order to give effect to the real intention of the parties to a transaction. Jones, Mortg., 4th ed., § 848. The principal case is an instance of a sound application of this doctrine, which has been strangely overlooked in a class of suretyship cases

somewhat analogous to this. It has been held that where a creditor holds a mortgage upon land of his debtor, in which he afterwards acquires the fee, there is a merger of the creditor's interests, a destruction of a security to which the surety had a right to be subrogated, and a consequent discharge of liability on the suretyship obligation. *Wright* v. *Knepper*, 1 Barr, 361; *Johnson* v. *Young*, 20 W. Va. 614. There seems to be no reason why the substantial rights of the creditor should not be preserved in such cases by a resort to the doctrine of the principal case.

TORTS — PROTECTION OF PROPERTY — IMMINENT DANGER. — The defendants in order to protect their property from destruction by a prairie fire set back-fires. *Held*, that the defendants are not liable for damages resulting from such back-fires. *Owen* v. *Cook*, 81 N. W. Rep. 285 (N. D.). See NOTES.

TRUSTS — CHARITABLE TRUSTS — UNCERTAINTY. — A testator devised his entire estate to his executor in trust to expend for such charitable objects in the diocese of Louisville as the executor should choose. *Held*, that the trust is void for uncertainty. *Spalding* v. *Saint Joseph's Industrial School*, 54 S. E. Rep. 200 (Ky.).

The result reached in this case is, of course, unfortunate and apparently unnecessary. Charitable trusts of an indefinite nature have been enforced in Kentucky, *Attorney-Gen.* v. *Wallace's Devisees*, 7 B. Mon. 617, but the court distinguishes such cases on the ground that, in them, the trustee's discretion was limited to a certain class of charitable uses. This distinction seems untenable on principle. The reason that trusts with no definite *cestui* named fail is that there is no one to compel the trustee to act. *Morice* v. *The Bishop of Durham*, 10 Ves. 521. But this reasoning does not apply to trusts for charitable objects, whether the trustee has absolute discretion, as in the principal case, or is limited to certain fields of charitable objects, because in either case the Attorney-General is usually given power to enforce the trust. *Jackson* v. *Phillips*, 96 Mass. 539; *Vidal* v. *Girard's Executors*, 2 How. 127. If the Kentucky courts allow one class of trusts to be so enforced, it seems that they should the other.

TRUSTS — PAROL CONTRACT TO CONVEY LAND — CONSTRUCTIVE TRUST. — The plaintiff conveyed a third interest in certain land to the defendant upon his parol agreement to reconvey a half interest in the same land. The defendant refused to perform his agreement. *Held*, that the plaintiff may recover his third interest. *Alexander* v. *McDaniel*, 34 S. E. Rep. 405 (S. C.).

When land is conveyed in exchange for an oral agreement to reconvey or to hold in trust for the grantor, and the grantee refuses to perform, setting up the Statute of Frauds as a defence, the American courts generally decline to hold him as a constructive trustee for the grantor, since by so doing the same relief would be granted as by enforcing the oral agreement or trust. *Williams* v. *Williams*, 180 Ill. 361; *McClain* v. *McClain*, 57 Iowa, 167. But where, as in the principal case, the oral agreement is to exchange one piece of land for another, no objection is found to raising a constructive trust, such relief being different from that given by enforcing the oral agreement. *Simons* v. *Bedell*, 122 Cal. 341. The distinction here made is hardly satisfactory, for the Statute of Frauds expressly does not apply to constructive trusts, and the fact that relief cannot be given on one theory seems no reason for refusing it on another. In England and a few States a trust would be created in both cases. *Davies* v. *Otty*, 35 Beav. 208; *Giffen* v. *Taylor*, 139 Ind. 573; *Bowler* v. *Curler*, 21 Nev. 158. This, it is believed, is the juster view. See 12 HARV. LAW REV. 506; 13 HARV. LAW REV. 227.

REVIEWS.

In a recent review of Professor William MacDonald's *Select Charters Illustrative of American History*, 13 HARVARD LAW REVIEW 420, we stated that Professor MacDonald doubtless owes the Royal Proclamation concerning America, 1763, to Channing and Hart's *American History Leaflets*, yet does not acknowledge it. In response to an explicit denial by Professor MacDonald we gladly withdraw that statement.